

Samsudin bin Ismail & Ors v Yeoh Oon Theam (as the administrator of the estate of Lim Mah Ee @ Baba Mahee, deceased) & Ors and another application A

HIGH COURT (PULAU PINANG) — CIVIL SUIT NOS 22–611 OF 2001 AND 22–32 OF 2002
VT SINGHAM J B
24 JULY 2003

Civil Procedure — Appeal — Appeal from registrar to judge in chambers — Deputy registrar dismissed defendants' application to strike out plaintiffs' claim — Whether decision of deputy registrar was appealable — Whether decision of deputy registrar was a 'decision' under s 3 of the Courts of Judicature Act 1964 C

Statutory Interpretation — Aids to construction — Hansard — When court can have reference to — Provision not ambiguous or obscure — Conflicting views by High Courts on interpretation of provision — No decision on point by Court of Appeal or Federal Court

Words and Phrases — 'Decision' — Courts of Judicature Act 1964 s 3 D

There were two suits in the instant case concerning disputes over the ownership of a piece of land in Pulau Pinang. On 19 July 2002, the first and second defendants' application to strike out the plaintiffs' claim in the first civil suit and the first defendant's application to strike out the plaintiffs' claim in second civil suit were dismissed with costs by the deputy registrar of the High Court, Pulau Pinang. Being dissatisfied with the decision of the deputy registrar in refusing to strike out the plaintiffs' writ of summons and statement of claim, an appeal to the judge in chambers was filed by the defendants. When both the appeals came up for hearing before the judge in chambers, the High Court posed to the parties a preliminary issue, namely, whether a party who was dissatisfied with the decision of a lower court or the registrar of the High Court in an interlocutory application which was heard and decided on affidavit evidence on its merits had a right of appeal to the judge of the High Court in view of the definition given to the word 'decision' in s 3 of the Courts of Judicature Act 1964 ('the CJA'). Section 3 of the CJA defined 'decision' as 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. Learned counsel for the defendants referred to the High Court the explanatory statement of the bill to assist the High Court in construing the definition given to the word 'decision' in s 3 of the CJA. The explanatory statement of the bill which sought to amend s 3 of the CJA stated as follows: 'At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the Superior Court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts'. E
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- A** **Held**, allowing the defendants' appeal:
- B** (1) Although the definition given to the word 'decision' in s 3 of the CJA was clear and not ambiguous or obscure, there were conflicting views by High Courts of co-ordinate jurisdiction on the interpretation of a particular amended statutory provision and there was no decision on the point by the Court of Appeal or the Federal Court. In the circumstances, the explanatory statement of the bill could be referred to as an aid to statutory interpretation (see p 632I-633A)
- C** (2) By looking at the definition given to the word 'decision' in s 3 of the CJA and having referred to the explanatory statement of the bill, it was clear that the intention of the amendment was to ensure that no appeal would be entertained if it concerned any ruling made in the course of a trial or hearing of any cause or matter which did not finally dispose of the rights of the parties by that ruling. In other words, there were two prerequisites. First, the ruling must be made in the course of a trial or hearing of any cause or matter (which did not include a decision made at the conclusion of a substantive interlocutory application even if the said application was made under the heading of the name trial). The second prerequisite was that the ruling which was made in the course of a trial or hearing of any cause or matter must not have finally disposed of the rights of the parties. One cannot read the second prerequisite in s 3 of the CJA, namely, '... does not finally dispose of the rights of the parties ...' in isolation but within the context of the first prerequisite, that is, the ruling made in the course of a trial or hearing (see p 633B-E); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 followed; *Alexander John Shek Kwok Bun v Wab Keluarga Realty Sdn Bhd* [2002] 1 MLJ 570, *Hong Hock Trading Co v Carseng Manufacturing (M) Sdn Bhd* [2003] 1 CLJ 325 and *Seabance Ge Capital Sdn Bhd v Dynabuilders Sdn Bhd & Anor* [2002] 5 MLJ 152 not followed.
- D**
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- G** (3) If a decision was given at the conclusion of the hearing of an interlocutory application on its merits and if that decision had finally disposed of the rights of the parties, the aggrieved party cannot be denied the right of appeal as it was not a ruling made in the course of hearing the interlocutory application but rather, a decision made at the conclusion of the hearing of the interlocutory application on its merits. The substantive right of access given to an aggrieved party to appeal to the judge of the High Court should not be confused with a procedural step to appeal and it must be distinguished because a restriction on the scope of a right to appeal must be expressly excluded and not by implication (see p 633H-634A).
- H**
- I** (4) In construing the word 'decision' as provided for in s 3 of the CJA, in the context of appeals, the High Court must in fact seek to apply the spirit of the reasoning behind the amendment as provided for in s 3 of CJA, which, amongst others, was to limit

appeals against procedural rulings made in the course of hearing any cause or matter. It was not intended to limit appeals against decisions made on interlocutory applications on its merits (see p 639F–H).

- (5) In the circumstances, both the defendants' appeals were competent and could proceed for hearing as the deputy registrar's decision to disallow the defendants' applications to strike out the statement of claim was not made in the course of hearing the interlocutory application to strike out the plaintiffs' claim but was a decision made upon hearing the merits of the said application (see p 640A–B).

[Bahasa Malaysia summary]

Terdapat dua guaman dalam kes semasa berkenaan pertikaian-pertikaian tentang pemunyaan sebidang tanah di Pulau Pinang. Pada 19 Julai 2002, permohonan defendan-defendan pertama dan kedua untuk membatalkan tuntutan plaintif-plaintif dalam guaman sivil pertama dan permohonan pertama defendan untuk membatalkan tuntutan plaintif-plaintif dalam guaman sivil kedua telah ditolak dengan kos oleh timbalan pendaftar Mahkamah Tinggi, Pulau Pinang. Oleh sebab tidak berpuas hati dengan keputusan timbalan pendaftar yang enggan membatalkan writ saman dan pernyataan tuntutan plaintif-plaintif, satu rayuan kepada hakim dalam kamar telah difailkan oleh defendan-defendan. Apabila kedua-dua rayuan dibicarakan di hadapan hakim dalam kamar, Mahkamah Tinggi mengutarakan kepada pihak-pihak satu persoalan permulaan, iaitu, sama ada satu pihak yang tidak berpuas hati dengan keputusan sebuah mahkamah bawahan atau pendaftar Mahkamah Tinggi dalam satu permohonan interlocutori yang telah didengar dan diputuskan atas meritnya mempunyai hak untuk merayu kepada hakim Mahkamah Tinggi berdasarkan takrif yang diberikan kepada perkataan 'decision' dalam s 3 Akta Kehakiman Mahkamah 1964 ('AKM'). Seksyen 3 AKM menafsirkan 'decision' sebagai 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. Peguam yang bijaksana bagi pihak defendan-defendan merujuk kepada Mahkamah Tinggi kenyataan yang bersifat penjelasan tentang rang undang-undang untuk membantu Mahkamah Tinggi menafsirkan takrifan yang diberikan kepada perkataan 'decision' dalam s 3 AKM. Kenyataan yang bersifat penjelasan yang dipohon untuk meminda s 3 AKM menyatakan seperti berikut: 'At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the Superior Court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial

A court. The amendment is proposed in order to help expedite the hearing of cases in trial courts’.

Diputuskan, membenarkan rayuan defendan-defendan:

- B (1) Walaupun takrif yang diberikan kepada perkataan ‘decision’ dalam s 3 AKM adalah jelas dan tidak taksa atau kabur, terdapat pendapat yang bertentnagan oleh Mahkamah Tinggi yang mempunyai bidang kuasa setara tentang tafsiran pindaan peruntukan statutori tertentu dan tiada keputusan berkaitannya oleh Mahkamah Rayuan atau Mahkamah Persekutuan. Dalam keadaan sedemikian, kenyataan yang bersifat penjelasan rang undang-undang tersebut boleh dirujuk sebagai bantuan untuk tafsiran statutori (lihat ms 632I-633A).
- C (2) Dengan melihat kepada tafsiran yang diberikan kepada perkataan ‘decision’ dalam s 3 AKM dan setelah merujuk kepada kenyataan yang bersifat penjelasan rang- undang-undang tersebut, ia adalah jelas bahawa niat pindaan tersebut adalah untuk memastikan bahawa tiada rayuan akan dilayan jika ia berkaitan dengan apa-apa keputusan yang dibuat semasa perbicaraan dijalankan atau perbicaraan apa-apa kausa atau perkara yang tidak melupuskan sepenuhnya hak-hak pihak-pihak dengan keputusan tersebut. Dalam erti kata lain, terdapat dua pra syarat. Pertama, keputusan tersebut hendaklah dibuat semasa perbicaraan atau perbicaraan apa-apa kausa atau perkara (yang tidak melibatkan satu keputusan yang telah dibuat di akhir permohonan interlokutori yang substantif walaupun permohonan tersebut telah dibuat di bawah kepala tajuk perbicaraan tersebut). Pra syarat kedua adalah bahawa keputusan yang dibuat semasa perbicaraan dijalankan atau perbicaraan apa-apa kausa atau perkara hendaklah tidak melupuskan sepenuhnya hak-hak pihak-pihak. Seseorang tidak boleh membaca pra syarat kedua dalam s 3 AKM, iaitu, ‘... does not finally dispose of the rights of the parties ...’ secara berasingan tetapi dalam konteks pra syarat pertama, iaitu, keputusan tersebut dibuat semasa perbicaraan dijalankan atau perbicaraan (lihat ms 633B–E); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 diikuti; *Alexander John Shek Kwok Bun v Wab Keluarga Realty Sdn Bhd* [2002] 1 MLJ 570, *Hong Hock Trading Co v Carseng Manufacturing (M) Sdn Bhd* [2003] 1 CLJ 325 dan *Seabance Ge Capital Sdn Bhd v Dynabuilders Sdn Bhd & Anor* [2002] 5 MLJ 152 tidak diikuti.
- D (3) Jika satu keputusan telah diberikan di akhir perbicaraan satu permohonan interlokutori berdasarkan meritnya dan jika keputusan tersebut telah melupuskan sepenuhnya hak-hak pihak-pihak, pihak yang terkilan tidak boleh dinafikan hak untuk merayu kerana ia bukan satu keputusan yang dibuat semasa perbicaraan permohonan interlokutori tetapi, suatu keputusan di akhir perbicaraan permohonan interlokutori berdasarkan meritnya. Hak substantif yang diberikan kepada pihak yang terkilan untuk
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merayu kepada hakim Mahkamah Tinggi tidak patut dikelirukan dengan satu langkah prosedur untuk merayu dan ia perlu dibezakan kerana satu halangan terhadap suatu hak untuk merayu hendaklah dikecualikan dengan nyata dan bukan melalui implikasi (lihat ms 633H–634A).

- (4) Dalam menafsirkan perkataan ‘decision’ sebagaimana yang diperuntukkan dalam s 3 AKM, dalam konteks rayuan-rayuan tersebut, Mahkamah Tinggi hendaklah menerapkan alasan di sebalik pindaan yang diperuntukkan dalam s 3 AKM, iaitu, antara lain, adalah untuk menghadkan rayuan-rayuan terhadap keputusan-keputusan mengikut prosedur yang dibuat semasa perbicaraan apa-apa kausa atau perkara. Ia tidak berniat untuk menghadkan rayuan-rayuan terhadap keputusan-keputusan yang dibuat terhadap permohonan-permohonan interlokutori berdasarkan meritnya (lihat ms 639F–H).
- (5) Dalam keadaan sedemikian, kedua-dua rayuan-rayuan defendan-defendan adalah kompeten dan boleh dibicarakan kerana keputusan timbalan pendaftar untuk menolak permohonan defendan-defendan untuk membatalkan pernyataan tuntutan tersebut tidak dibuat semasa perbicaraan permohonan interlokutori untuk membatalkan tuntutan plaintif-plaintif tetapi adalah satu keputusan yang dibuat setelah mendengar merit permohonan tersebut (lihat ms 640A–B).]

Notes

For cases on appeals from the registrar to the judge in chambers, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 583–585.

For cases on *Hansard*, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1630–1631.

Cases referred to

Alexander John Shek Kwok Bun v Wab Keluarga Realty Sdn Bhd [2002] 1 MLJ 570 (not folld)

Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 (refd)

Attorney General v Times Newspapers Ltd [1974] AC 273 (refd)

Bimil Sdn Bhd v Jeniswire Timber Sdn Bhd [2002] 6 CLJ 277 (refd)

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 2 WLR 513 (refd)

Bozson v Altrincham Urban District Council [1903] 1 KB 547 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Corocraft Ltd and another v Pan American Airways Inc [1969] 1 QB 616 (refd)

DYTM Tengku Idris Shah Ibnu Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd [2002] 2 MLJ 11 (folld)

- A** *Escoigne Properties Ltd v Inland Revenue Commissioners* [1958] AC 509 (refd)
Fawsilt Galland v Burton, In re (1885) F 365, Vol XXX 231 (refd)
First Malaysia Bhd, Re [1990] 1 MLJ 504 (refd)
Gilbery v Endean (1878) 9 Ch D 259 (refd)
- B** *Hanning v Maitland* [1969] 3 All ER 1558 (refd)
Hong Hock Trading Co v Carseng Manufacturing (M) Sdn Bhd [2003] 1 CLJ 325 (not folld)
Indran & Anor v PP [1985] 1 MLJ 326 (folld)
Katikiro of Buganda v Attorney General [1961] 1 WLR 119 (refd)
- C** *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537, [2000] 4 AMR 4190 (refd)
King, The v Banbury 1 AD & E 136 1159 (refd)
Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union [1971] 1 MLJ 102 (refd)
- D** *Laird v Briggs* (1881) Vol XVI Ch D 663 (folld)
Leader v Duffey (1888) 13 App Cas 294 (refd)
Lee Boon Tuan v PP [1960] MLJ 179 (refd)
Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor [2000] 3 MLJ 328 (folld)
- E** *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (refd)
Malaysia British Assurance Berhad v Chung Choi Yoke [2003] 4 AMR 124 (folld)
Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359 (refd)
- F** *Maunsell v Olins & Anor* [1974] 3 WLR 835 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ng Cheah Cheong v Ong Sing Hock [2002] 6 MLJ 481 (folld)
Ogden Industries PTY LTD v Lucas [1969] 3 WLR 75 (refd)
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42 (folld)
- G** *PP v RK Menon & Anor* [1978] 2 MLJ 152 (folld)
PP v Hoo Chang Chwen [1962] MLJ 284 (folld)
R v Environment Secretary, ex p Spath Holme Ltd (HL(E)) [2001] 2 AC 349 (folld)
Ratnam v Cumarasamy & Anor [1962] MLJ 330 (refd)
- H** *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 (folld)
Rassage v Rossage & Anor [1960] 1 All ER 600 (refd)
S (Minors) (Careorder: Implementation of Careplan), Re [2002] 2 AC 291 (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129 (refd)
- I** *Saif Ali v Sidney Mitchell & Co* [1978] 3 WLR 849 (refd)
Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd [2002] 5 MLJ 152 (not folld)

- Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 (refd) **A**
- Shaw v Hertfordshire County Council* (1899) 2 QB 282 (refd)
- Siskina (Cargo Owners) v Disstoss SA* [1979] AC 210 (refd)
- Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 (folld)
- Sivananthan all V Jaganathan v Teh Yee Fun & Anor* [2003] 3 AMR 584 (folld) **B**
- Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 (folld)
- Sussex Peerage, The* (1844) HL 11 CL & FIN Vol LXV 11 (refd)
- Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495 (folld)
- Tee Than Song Construction Co Ltd v Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205 (refd) **C**
- Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50 (not folld)
- Tetuan J & S Holding Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739 (folld) **D**
- Tio Chee Hing v Chung Khiaw Bank Ltd* [1982] 1 MLJ 137 (refd)
- Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (refd)
- Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 (refd) **E**
- Warburton v Loveland* (1831–32) II Dow & Clark 806 (refd)
- Wilson v First County Trust Ltd* [2003] All ER (D) 187 (folld)
- Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 (refd)
- Yew Boon Tew v Kenderaan Bas MARA* [1983] 1 MLJ 1 (refd) **F**

Legislation referred to

- Criminal Procedure Code s 129(i)(b)
- Courts of Judicature Act 1964 ss 3, 20, 28(1), 50(2), 67(1)
- Limitation Act 1963 s 6(1) **G**
- National Land Code s 22(1)
- Penal Code ss 109, 193
- Rules of the High Court 1957 O 42 r 23
- Rules of the High Court 1980 O 56
- Subordinate Court Rules 1980 O 12 r 5(1), O 14 r 21, O 26A, O 49 r 6(1) **H**
- Supreme Court Ordinance 1959 s 3(1)

Dato' RR Sethu (Mohd Hussain bin Mohd Ibrahim with him) (Mohd Hussain Ibrahim & Co) for the second defendant in Civil Suit No 22–611 of 2001. **I**

Dato' R Rajasingham (Mohd Hussain Ibrahim & Co) for the first defendant in Civil Suit No 22–32 of 2002.

A *Mohd Ismail bin Mohamed (Sunny Khoo with him) (Ismail Khoo & Assoc)* for the plaintiffs in in Civil Suit No 22–611 of 2001 and Civil Suit No 22–32 of 2002.

B **VT Singham J:** In Civil Suit No 22–611 of 2001, the plaintiffs' claim was for the following declarations, damages and costs against the defendants.

(a) satu pengistiharan bahawa BABA MAHU @ WASHAHIDU LUH MOHD ALI adalah tuan sebenar Lot 3475, Pecahan Bandar 5, Daerah Timur Laut, Pulau Pinang menurut indentur bertarikh 22 April 1831 pendaftaran No 6093/1831;

C (b) satu perintah persetujuan Mahkamah Tinggi Guaman No 22–55–94 (MT1) oleh penolong kanan pendaftar bertarikh 29 Mei 1995 dibatalkan;

(c) satu perintah permohonan defendan pertama dalam saman pemula 24–1004–2001 bagi siasatan menentukan waris–waris ditangguhkan hingga selesai pembicaraan kes ini;

D (d) satu pengistiharan yang jualan tanah Lot 3475, Pecahan Bandar 5, Daerah Timur Laut, Pulau Pinang oleh defendan pertama kepada Defendan Kedua tidak sah dari segi undang-undang;

(e) satu perintah bahawa defendan kedua serta-merta mengembalikan hak milik Lot 3475, Pecahan Bandar 5, Daerah Timur Laut, Pulau Pinang, No Pendaftaran Grant 41383 kepada plaintif-plaintif.

E (f) satu perintah bahawa tanah tersebut yang diletakkan ke atas defendan kedua dibatalkan;

(g) satu perintah mengarahkan defendan ketiga dan keempat mengambil semua tindakan bagi memberi kesan kepada perintah perintah dalam perintah ini.

F (h) satu perintah mengarahkan defendan ketiga dan keempat memberi wang pampasan pengambilan tanah yang dibuat pada 4 Februari 1993, 24 Mei 1993, 28 Oktober 1999 dan 14 Mac 2000 kepada plaintif-plaintif,

G (i) ganti rugi; dan

(j) kos;

In Civil Suit No 22–32 of 2002, the plaintiffs' claim was for the following declaration, damages and costs against the defendants.

H (a) satu pengistiharan bahawa BABA MAHU @ WASHAHIDU LUH MOHD ALI adalah tuan punya tanah sebenar Geran 1638, Pegangan 54, Pecahan Bandar 5, Daerah Timur Laut, Pulau Pinang menurut Indentur bertarikh 22 April 1831 Pendaftaran Nombor 6093/1831;

I (b) satu pengistiharan yang kemasukan empat nama oleh defendan kedua dan defendan ketiga iaitu (i) YEOH CHEOW ENG (1/4), (ii) KHOO SON THAY (1/4), (iii) LIM GEIK KHYM (1/4) dan (iv) KAM SAW GEK (1/4) adalah tidak sah;

- (c) satu pengistiharan pindahtanah kesemua keempat-empat bahagian tanah dipindahtanah kepada CENTRAL THREE (M) SDN BHD adalah tidak sah dari segi undang-undang; A
- (d) satu perintah bahawa defendan pertama serta merta mengembalikan hak milik tanah atas Geran 1638, Pegangan 54, Pecahan Bandar 5, Daerah Timur Laut, Pulau Pinang kepada plaintif-plaintif sebagai waris-waris cicit kepada BABA MAHU @ WASHAHIDU LUH MOHD ALI; B
- (e) satu perintah mengarahkan defendan kedua dan ketiga mengambil semua tindakan bagi memberi kesan kepada perintah dalam perintah ini; C
- (f) satu perintah mengarahkan defendan kedua dan ketiga memberi wang pampasan pengambilan tanah yang dibuat pada 14 Februari 1991 seluas 20,037.6 kaki persegi kepada plaintif-plaintif; D
- (g) ganti rugi; dan
- (h) kos. E

On 19 July 2002, both the first and second defendants' application to strike out the plaintiffs' claim in Civil Suit No 22–611 of 2001 and the first defendant's application to strike out the plaintiffs' claim in Civil Suit No 22–32 of 2002 was dismissed with costs by the deputy registrar of the High Court, Penang. F

As the first and second defendants in the High Court Civil Suit No 22–611 of 2001 and the first defendant in the Civil Suit No 22–32 of 2002 were dissatisfied with the decision of the deputy registrar who had refused to strike the plaintiffs' writ of summons and statement of claim, an appeal to the judge in chambers was filed on 25 July 2002. G

On 23 January 2003, when both the appeals came up for hearing before the judge in chambers, this court posed to the parties a preliminary issue, namely, whether the appeals were maintainable in view of the interpretation given to the word 'decision' in s 3 of the Courts of Judicature Act 1964 (Amendment Act) ('the CJA') by his Lordship Richard Malanjum J (as he then was) in three of his Lordship's decisions, namely: H

- (i) *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537, [2000] 4 AMR 4190; I
- (ii) *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50; and
- (ii) *Bimil Sdn Bhd v Jeniswire Timber Sdn Bhd* [2002] 6 CLJ 277. H

Section 3 of the CJA defines the word 'decision' as follows:

'decision' means judgment, sentence or order, *but does not include any ruling made in the course of a trial or hearing of any cause or matter* which does not finally dispose of the rights of the parties. (Emphasis added.) I

Dato' RR Sethu, leading counsel for the appellants in Civil Suit No 22–32 of 2002 submitted as follows:

- A** (i) that the appeal was maintainable and he referred to the case of *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315;
- (ii) that the decision of the learned deputy registrar was not a ruling made in the course of a trial or hearing of any cause or matter but was a decision made after hearing the parties on the substantive interlocutory application and was therefore appealable;
- B** (iii) the explanatory statement to the bill which was introduced for the amendment to s 3 of the CJA could be taken into account by the court and he relied on the case of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

C Dato' R Rajasingam learned counsel for the appellants in the Civil Suit No 22–611 of 2001 submitted that the appeal before the deputy registrar was appealable and he adopted the submissions of Dato' RR Sethu learned counsel for appellants in the Civil Suit No 22–32 of 2002.

On the other hand, learned counsel for the respondents, En Mohd Ismail bin Mohamed submitted as follows:

- D** (a) that the appellants cannot maintain this appeal in view of s 3 of the CJA;
- (b) however, learned counsel was candid when he submitted that the decisions of the High Courts were not consistent in construing the word 'decision' as laid in s 3 of the CJA and there was uncertainty;
- E** (c) nevertheless, learned counsel left it to the discretion of this court because of the uncertainty of the several conflicting decisions and there was no reported decision of the Court of Appeal on this issue at that time.

F On hearing both parties and after considering the recent decision in *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 and the express provisions in s 3 of the CJA, this court ruled that the appeal was competent and the appellants have the right of appeal against the decision of the learned deputy registrar of the High Court against both the interlocutory application and ordered the hearing of the appeal to proceed.

G As counsels for both the appellants tendered written submissions with the list of authorities after this court had ruled this appeal to proceed on the merits, the respondents' counsel applied for time to file written submissions within two weeks. This court then directed the respondents' counsel to file written submissions within two weeks and fixed a date for hearing of both the appeals.

H The grounds of the ruling in the instant case is only confined to the amendment to s 3 of the CJA, ie whether a party who is dissatisfied with the decision of a lower court or the registrar of the High Court in an interlocutory application which was heard and decided on affidavit evidence on its merits has a right of appeal to the judge of the High Court in view of the definition given to the word 'decision' in s 3 of the CJA (Act 1031/98) which came into effect on 1 August 1998. Accordingly, the fundamental question in the instant case is, whether s 3 of the CJA limits appeal from decisions given in interlocutory applications upon hearing the merits and at the conclusion of the said application. In other words, whether the High Court may entertain

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an appeal where the appeal is against the decision made upon full hearing of an interlocutory application on its merits.

In *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696, the defendant appealed to the Court of Appeal against the decision of the High Court which struck off the defendant's application to set aside the ex parte interim injunction granted against the defendant. At the Court of Appeal, the plaintiff raised an objection that the appeal was not maintainable as it was not a final decision within the meaning of s 3 of the CJA. His Lordship NH Chan JCA held that:

It is to be noted that the word 'decision' is not used in s 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67, civil appeals to the Court of Appeal are from any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature. (Emphasis added.)

In *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537, [2000] 4 AMR 4190, the plaintiff appealed against the decision of the learned sessions court judge who dismissed his application under O 14 r 21 of the Subordinate Court Rules 1980 ('the SCR') to strike out the defendant's statement of defence. The learned sessions court judge ruled there were triable issues. At the appeal, a preliminary issue was raised, whether the appeal was competent in view of the definition given to the word 'decision' in s 3 of the CJA. His Lordship Richard Malanjum J (as he then was) held:

This is an appeal by the appellant/plaintiff against the ruling by the learned Sessions Court Judge Sandakan (SCJ) dismissing its application made under Order 14 r 21, Order 22 r 3 and Order 53 r 11 of the Subordinate Court Rules 1980 (SCR 1980) to strike out the defence of the respondent/defendant. The learned SCJ ruled that there were triable issues.

Anyway before the hearing proper could proceed a preliminary question was raised in that whether this appeal is competent in view of the meaning of the word 'decision' under s 3 of the Courts of Judicature Act 1964 as amended ('the Act').

However r 1 of O 49 states thus:

'In this Order 'decision includes 'judgment', 'order' and 'decree.'

- A** In view of the word 'decision' having been defined in the SCR 1980 I do not think the definition of that word as found in s3 of the Act can be imported. As such there is no merit in the contention of learned counsel for the respondent/defendant that relies on Order 49 r2(2) of the SCR 1980. At any rate Order 49 is not an empowering provision for the High Court to hear appeals from subordinate courts.
- B** Meanwhile, as regards s 28 of the Act learned counsel for the appellant/plaintiff seems to think that the restriction is only confined to a decision bearing a sum of RM10,000 or less with the exception where there is a point of law involved. Otherwise learned counsel is of the view that any decision of a subordinate court is appealable.
- C** Based on principle enunciated in the aforementioned cases it is therefore obvious that in the instant case the ruling of the learned SCJ granting the respondent/defendant unconditional leave to defend the action is only an interlocutory order. It is not therefore a decision as defined under s 3 of the Act. And as it is my view that there has to be a decision first before the appellate civil jurisdiction of the High Court may be exercised this present appeal is therefore incompetent.
- D** In passing I note that the Court of Appeal in the case of *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 took the approach that when considering a provision in the Act the presence or absence of the word 'decision' would make a difference. This is what his Lordship NH Chan JCA said at pp 2812–2813:
- E** 'Unlike *Anwar*'s case [1999] 1 AMR 846) the instant appeal is a civil appeal in which s 67(1) of the CJA applies. Section 67(1) of the Act reads:
- F** "The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought."
- G** ... There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature.
- H** Meanwhile, the word 'decision' appears in s 28 of the Act. As such its definition as given in s 3 thereof is therefore applicable.
- Accordingly, for the above reasons *it is thus my judgment that this present appeal is incompetent should therefore be dismissed in limine.* (Emphasis added.)
- I** In *Tetuan J & S Holding Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739, the defendants' counsel raised a preliminary objection on 20 February 1999 that the plaintiffs' claim was statute barred under s 6(1) of the Limitation

Act 1963 and ought to be dismissed. The learned Magistrate, Magistrate's Court, Temerloh overruled the preliminary objection. Hence, the appeal by the defendants against the ruling on the preliminary objection. In that case, the plaintiffs' claim was as follows: **A**

Statement of claim

The plaintiffs' claim against the defendants was for damages for breach of the terms of the sale and purchase agreement dated 14 November 1988, particularly cl 18(1), namely for the late delivery of vacant possession of a single-storey terrace house at the price of RM38,000 which was part of a housing project. The plaintiffs alleged that pursuant to the terms of the agreement, the defendants had agreed to deliver vacant possession of the house to the plaintiffs within 24 months from the date of signing the agreement by both the parties, that was, by 13 November 1990 but vacant possession of the house was only delivered on 31 May 1996. The plaintiffs' claim for damages was for the period from 13 November 1990 till 21 May 1996 (five years ten months) calculated at the rate of 10% pa of the purchase price of RM38,000 which amounted to RM20,983.27 interest and costs. **B**

Statement of defence

The defendants by their statement of defence pleaded, inter alia, that the defendants' management was taken over by a new company and since then, the purchasers of the housing project including the plaintiffs, had agreed and gave an undertaking during the negotiations between the purchasers and the new management that the purchasers will allow an extension of time to the new management to complete the project and will forgo their rights under cl 18(1) and 18(2) of the agreement. Consequently, the defendants pleaded that the plaintiffs were estopped from commencing the action against them. The defendants also pleaded that since the action by the plaintiffs was not commenced within six years, the action was statute-barred under the provisions of s 6(1) of the Limitation Act 1953. **C**

Section 6(1) reads as follows: **D**

Limitation

Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say — **E**

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- A** (a) actions founded on a contract or on tort;
(b) actions to enforce a recognisance;
(c) actions to enforce an award;
(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
- B** In reply to the preliminary objection raised by the defendants' counsel, the plaintiffs' counsel produced a letter dated 16 October 1995 from the defendants to the plaintiffs wherein the defendants had acknowledged the breach of the agreement and had asked for extension of time till the end of December 1995 to settle the plaintiffs' claim. The plaintiffs' counsel
- C** contended that the time to be calculated for the purpose of the claim was from 16 October 1995 and not 13 November 1990. The learned magistrate however overruled the preliminary objection on the issue of limitation and fixed a date for the hearing of the civil action. The defendants appealed against the ruling on the preliminary objection to the High Court, Temerloh.
- D** In dismissing the appeal, I ruled in that case that the ruling on the preliminary objection was not appealable within the meaning of the word 'decision' as defined under s 3 of the CJA. Further, I had held that:
- In the appeal before this court, the decision or ruling made by the learned magistrate on the preliminary objection was not a final decision as it has only
- E** disposed of the preliminary objection thereby leaving scope for the parties to proceed with the hearing on the principal or main subject matter which will determine the rights of the parties in the civil action.
- On the other hand, if the order or decision had finally disposed of the principal matter or the subject matter in dispute thereby bringing a conclusion to the whole of the proceedings without a further date of hearing, it is the view of this
- F** court that the order or decision in those circumstances was appealable.
- As the defendants have raised the issue of limitation in the statement of defence, the defendants have the right to rely on that plea of limitation when the case proceeds for hearing notwithstanding the decision of the learned
- G** magistrate on the preliminary objection which was only an interlocutory order and not a final order. Consequently, it is the view of this court that the doctrine of *res judicata* does not apply against the defendants as the learned magistrate has not heard the evidence on the merits and the defendants are entitled to raise once again the plea of limitation as part of the defendants' case during the trial.
- H** This court is of the view that if a party is allowed to appeal against a ruling or decision made on a preliminary objection before the start of a trial or during the trial which decision does not determine or finally dispose of the rights of the parties as spelt out in s 3 of the Courts of Judicature Act 1964, the High Courts will be flooded with appeals and have to deal with those appeals as
- I** speedily as possible in order not to prolong the trial in the lower courts which will be pending until the outcome of the decision of the appeal. If this situation is allowed to happen, the hearing of the cases in the lower courts will come to a standstill whereby it will result in the backlog of cases in the lower courts. It

is fortunate that the new interpretation of the word 'decision' in s 3 of the Courts of Judicature Act 1964 had made it expressly clear and, by implication, this court is of the view the word 'decision' in O 49 r 6 of the Subordinate Courts Rules 1980 does not apply to the decision made by the learned magistrate on the preliminary objection and on the facts of this case.

A

However, it is not inappropriate to state that if the decision of the learned magistrate had allowed the preliminary objection and which by implication would have disposed of the plaintiffs' claim, the plaintiffs no doubt will have the right of appeal against the decision as that decision or ruling would have finally disposed of the plaintiffs' right to the claim thereby denying the plaintiffs from proceeding with the full hearing of their claim.

B

In the circumstances, the defendants' appeal is dismissed with costs. This court is of the view that the appeal was unnecessary which as a result had caused the hearing of the main suit in the magistrate's court to be delayed indefinitely pending the outcome of this appeal.

C

In *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50, the plaintiff appealed against the order of the learned senior assistant registrar which allowed the defendant's application to set aside:

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- (i) the order granting the plaintiff leave to serve the writ of summons on the defendant by way of substituted service and;
- (ii) the service of the said writ itself upon the defendant.

E

The only reason for the defendant to make such an application was that the defendant and one Kwak Hyung Min were no longer conducting business or residing in Malaysia when the writ was issued and/or served and hence were out of jurisdiction of the Malaysian courts. In that case, his Lordship Richard Malanjum J (as he then was) posed the question whether the appeal was competent in view of the definition given to the word 'decision' in the amended s 3 of the CJA 1964. In dismissing the appeal after hearing both parties, His Lordship said:

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Accordingly in my view the words 'judgment or order' in the said Order should not be given a general or expanded meaning. Instead they should be restricted to the less general meaning assigned to the word 'decision' in the CJA.

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Thus, where a defendant managed to establish to the satisfaction of the SAR that indeed he had not been properly served with the writ, I do not think there would be any question of exercising discretion on the part of the SAR whether or not to set aside the writ or the service of it. Accordingly, in my view any ruling of a nature as in this present case where the exercise of discretion does not arise, appears to be caught by the effect of the current definition of the word 'decision' in s 3 of the CJA. In passing I also noted that *Seloga Jaya Sdn Bhd* was decided well before the amendment to the definition of the word 'decision' was passed. The impact of the current definition, if at all relevant to the issue before Their Lordships, was therefore not addressed.

H

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- A** As such it is my judgment that not all ruling, decision, judgment or order of a Registrar (which include a Deputy and Senior Assistant Registrar) is appealable to a judge in chambers. The element of finality in the disposal of the rights of the parties must be present in such ruling, judgment, order or decision, particularly where there is no exercise of discretion involved.
- B** Accordingly, an interlocutory judgment, order, ruling or decision is not appealable. I am very much aware that what I have said here may appear to be hair-splitting. But I cannot ignore the fact that there is the amended version of the definition of the word 'decision' in s 3 of the CJA and the probable legislative intent for such an amendment. Further, indeed Order 56 r 1 speaks of an 'appeal' to begin with. And in my view *Seloga Jaya Sdn Bhd* should not be read as having amended the provision, but only provided a guideline in approaching such an appeal particularly where discretion is involved.
- C**

Next is the determination of whether an order, judgment, ruling or decision is final or interlocutory.

- D** The issue whether the judgment was final and interlocutory was therefore decided by the finality effect. But the order was also made on an application of such a character that whatever order had been made therefrom must finally have disposed of the matter in dispute. Whatever the test that is applied, the order is a final order.

- E** Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.
- F**
- G**

- H** The real distinction is between (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. *In general, a judgment or order which determines the principal matter in question is termed 'final': see 26 Halsbury's Law England*, paragraph 505 at p 238. Actually, the use of the term 'final' is tautological as all judgments and orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s 3 by the 1998 amendment. *In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the*
- I**

matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable. **A**

Turning therefore to the case at hand the thrust of the complaint of the plaintiff was that the learned SAR was wrong in allowing the application of the defendant to set aside the leave granted to serve the writ by way of substituted service and the service itself. Such ruling in my judgment should not be categorized as having the effect of final disposal of the rights of the parties in the action. The action itself is still there and it should now be the move of the plaintiff to do the necessary so as to enable it to properly serve the writ upon the defendant in compliance with the prevailing Rules of the High Court 1980 and other relevant laws. *Clearly therefore that the ruling of the SAR complained of is interlocutory in nature and thus not appealable in view of the present position of the law.* (Emphasis added.) **B**

In *Alexander John Shek Kwok Bun v Wab Keluarga Realty Sdn Bhd* [2002] 1 MLJ 570, the defendant appealed against the decision of the learned sessions court judge who dismissed with costs his notice of application under O 12 r 5(1) and O 26A of the Subordinate Courts Rules 1980 for summary judgment to be signed against the third party/respondent for the sum of RM75,924.61 as it was decided that there were triable issues. In fact, the plaintiff's claim (Government of Malaysia) against the defendant was for the sum of RM76,095.15 being increased tax of 10% and 5% respectively. The defendant took out third party proceedings against the respondent/third party claiming contribution and/or indemnity from the respondent/third party in respect of the plaintiff's claim against him. **C**

At the hearing of the appeal in that case, the plaintiff raised a preliminary objection that the decision of the learned sessions court judge who dismissed the defendant's notice of application for summary judgment to be signed against third party/respondent was not appealable as it was not a final order. His Lordship Zakaria Sam JC in that case ruled that the ruling of the learned sessions court judge did not come under the meaning of 'decision' under s 3 of the CJA (Amendment Act A1031 which came into effect on 31 July 1998). His Lordship also said: **D**

In the instant appeal, the decision by the learned sessions court judge in dismissing the defendant's application for summary judgment did not finally dispose of the defendant's right against the respondent. The main suit by the defendant against the respondent was still pending. As such, he still has the chance to prove his case against the respondent. **E**

Further, in upholding the preliminary objection and dismissing the appeal with costs, Zakaria Sam JC said: **F**

In the present appeal, the dismissal of the defendant's application under O 26A of the SCR against the respondent did not finally dispose of the right of the defendant and therefore, in my opinion, certainly is not a proper matter for appeal. In the absence of the right to appeal, the defendant has no locus standi to have his application for summary judgment to be reheard by this court. **G**

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- A** In *Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd* [2002] 5 MLJ 152, the plaintiff's appeal against the decision of the learned sessions court judge who had dismissed with costs on 26 March 2000 their application for summary judgment under O 26A of the Subordinate Courts Rules 1980 against the defendant. On 27 March 2000, when the appeal came up for hearing, the defendant/respondent raised a preliminary objection and posed the question as to whether the appeal was maintainable as the decision of the learned sessions court judge did not finally dispose of the rights of the parties. His Lordship Ahmad Maarop JC (as he then was) in upholding the preliminary objection of the defendant/respondent and dismissing the appeal said:
- B**
- C** ... Tiada apa-apa dalam definasi tersebut atau mana-mana peruntukkan di bawah Akta tersebut yang menyatakan bahawa definasi tersebut adalah terpakai hanya bagi 'ruling' (keputusan) yang dibuat dalam kes jenayah sahaja. Pada hemat saya perkataan any 'cause or matter' adalah cukup luas untuk meliputi kes sivil dan jenayah. Daripada definasi tersebut adalah jelas bahawa keputusan dalam mana-mana kausa atau perkara sivil yang tidak dengan secara muktamadnya memutuskan hak-hak pihak-pihak dalam sesuatu kes itu bukanlah suatu keputusan, dan tidak boleh dikemukakan ke Mahkamah Tinggi untuk rayuan, walaupun nilai perkara yang menjadi subjek kes itu adalah lebih dari RM10,000. Dalam membuat penghakiman sedemikian saya bersetuju dengan keputusan dalam kes *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd*, *Tetuan J & S Holding Sdn Bhd v A Karim bin Hassan* [2000] 6 MLJ 739 dan kes *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50.
- D**
- E**
- Begitu jugalah halnya dalam kes ini. Tindakan dan tuntutan perayu terhadap responden seperti yang dinyatakan dalam pernyataan tuntutannya bertarikh 23 Julai 1999 masih ada di mahkamah sesyen menunggu satu perbicaraan penuh dimana saksi-saksi akan dipanggil memberi keterangan. Keputusan yang telah dibuat oleh Hakim Mahkamah Sesyen Seremban pada 23 Jun 2000 itu tidak menyelesaikan perkara pokok dalam kes ini dan tidak menamatkan keseluruhan prosiding dalam kes ini tanpa perbicaraan selanjutnya di mahkamah itu. Dalam penghakiman saya, keputusan hakim mahkamah sesyen menolak permohonan perayu untuk memasukkan penghakiman terus dibawah A 26A KMR bukan keputusan yang telah memutuskan dengan muktamadnya hak-hak perayu dan defendan dalam kes ini. Hak-hak mereka akan hanya diputuskan dengan muktamadnya pada akhir perbicaraan penuh di mahkamah sesyen itu apabila mahkamah itu nanti membuat keputusan membenarkan tuntutan perayu samada sepenuhnya atau sebahagiannya, atau menolak tuntutan perayu. Oleh yang demikian keputusan yang dibuat oleh Hakim Mahkamah Sesyen Seremban dalam kes ini pada 23 Jun 2000 tidak boleh dikemukakan ke Mahkamah Tinggi untuk rayuan.
- F**
- G**
- H**
- I** ... Ini adalah kerana berikutan dengan definasi 'decision' yang wujud sekarang, kesemua mereka tidak boleh merayu ke Mahkamah Tinggi terhadap keputusan mahkamah rendah menolak permohonan mereka untuk memasukkan penghakiman terus.

In *Bimil Sdn Bhd v Jeniswire Timber Sdn Bhd* [2002] 6 CLJ 277, the defendant appealed against the decision of the learned deputy registrar of the High Court who dismissed the defendant's application to amend the statement of defence. The preliminary issue both parties had agreed to raise at the appeal was, whether the appeal was competent. In dismissing the appeal both on the preliminary objection and the merits of the appeal, his Lordship Richard Malanjum J (as he then was) said:

Accordingly I must say that even an application involving the exercise of discretion is caught by the amended version of the word 'decision' in s. 3 of the Act where an order made is an interlocutory order.

And in the present case there is no dispute that the ruling of the learned deputy registrar is interlocutory in nature and thus is caught by the said section in relation to the definition of the word 'decision' therein. Hence I agree with learned counsel for the plaintiff that this appeal of the defendant is incompetent and should be dismissed in limine.

On the other hand, in *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315, the defendant appealed against the decision of the learned sessions court judge who dismissed with costs the defendant's application to strike out the summons and the statement of claim under O 14 r 21 of the Subordinate Courts Rules 1980. At the appeal, the plaintiff/respondent raised a preliminary objection, as to whether the decision to dismiss the appellant/defendant's application was appealable. In dismissing the preliminary objection, his Lordship Abdul Aziz J (as he then was) said:

In contending that the dismissal of the striking out application is not appealable, learned counsel for the respondent focuses on the words 'does not finally dispose of the rights of the parties'. His submission comes down to this, that the rights of the parties will finally be disposed of only when the respondent's claim in the action is either dismissed or allowed, and that since the dismissal of the appellants' striking out application leaves intact the respondent's claim as yet to be finally adjudicated, the dismissal of the striking out application did not finally dispose of the rights of the parties and was therefore not a 'decision' and is not appealable.

That may be right as far as the words 'does not finally dispose of the rights of the parties' are concerned, but they are not the only words that need to be considered. *The words 'ruling made in the course of a trial or hearing of any cause or matter' must not be overlooked. For a ruling to be not a 'decision', it is not enough that it does not finally dispose of the rights of the parties. The ruling must also be one made in the course of a trial or hearing of any cause or matter. Even if the dismissal of the striking out application did not finally dispose of the rights of the parties, the question must be considered whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not, it is not excluded by the definition of 'decision' and is therefore appealable. That question has not been addressed by the respondent's counsel.*

A clear example of a ruling made in the course of a trial of a cause or matter is a ruling on a question arising in the course of the trial – which ruling is, as it must necessarily be, made in the course of the trial – whether a particular document is admissible in evidence. A clear example of a ruling made in the course of a hearing

A *of a cause or matter is where, in the course of the hearing of, say, an originating summons, a ruling is made, on a question arising in the course of the hearing, whether an affidavit ought to be disallowed.*

B *The dismissal in this case of the appellants' striking out application was clearly not, in my opinion, a ruling made in the course of a trial or hearing of any cause or matter, and is therefore appealable. It is out of the question that it was made in the course of the trial of the respondent's action. The trial had not even commenced. Neither was it a ruling made in the course of the hearing of the striking out application, because the decision to dismiss the application was made after, not in the course of, the hearing of the application. Moreover, a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question whether the application is to be allowed or dismissed.*

In my opinion, the right to appeal from a particular decision can only be denied by clear words.

D My opinion that the dismissal of the appellants' striking out application is appealable is at odds with the decisions of Richard Malanjum J in *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] 4 AMR 4190 and *Teoh Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50. That is necessarily so because Richard Malanjum J, it would seem, was not, or did not feel, called upon to consider the words 'ruling made in the course of a trial or hearing of any cause or matter'.

E *Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the CJA is a question of statutory interpretation of that clause. In my opinion it is, I say with respect, an incorrect approach to the interpretation of that clause to begin, as it seems to me was done by Richard Malanjum J and the respondent's counsel in his written submission, by asking the question whether the decision is a final order or an interlocutory order, and I say so because the term 'final order' or 'interlocutory order' is not used in the excluding clause. It is the actual words used in the excluding clause that have to be considered. The position here is different from that in *Ratnam v Cumarasamy & Anor* [1962] MLJ 330, where, because those terms appeared in s 3(1) of the Appeals from the Supreme Court Ordinance 1958, which was the statutory provision in question, the Court of Appeal had to embark upon a consideration of the question when an order is final and when it is interlocutory. In the two cases decided by Richard Malanjum J and in the written submission of the respondent's counsel in this case, the preoccupation with the inquiry into the meaning of 'final order' and 'interlocutory order' — terms not used in the excluding clause — and the impact of the result of the enquiry, namely, that a final order is one that finally disposes of the rights of the parties, and an interlocutory order is one that does not, which impact brings into prominence the second part of the excluding clause, might have eclipsed the words of the first part and the value of those words.*

I Those words were also not considered in *Seabance Ge Capital Sdn Bhd Iwn Dynabuilders Sdn Bhd* [2002] 5 MLJ 152 because they were not a point taken up in argument. (Emphasis added.)

In *Hong Hock Trading Co v Carseng Manufacturing (M) Sdn Bhd* [2003] 1 CLJ 325, the plaintiff appealed against the decision of the learned registrar of the High Court given on 20 February 2002 who dismissed with costs his application for summary judgment under O 14 of the Rules of the High Court 1980 as there were triable issues and that the matter ought to go for trial. At the outset of the hearing of the appeal, learned counsel for the defendant/respondent raised a preliminary objection that the appeal was incompetent in view of the definition given to the word 'decision' in Section 3 of the CJA on the ground that the decision of the learned registrar had not finally determined the rights of the parties and the case was still pending at the High Court for full trial. The issue before the High Court in that case as posed was, whether the decision of the registrar was appealable. In upholding the preliminary objection raised by the plaintiff's counsel and in striking out the appeal with costs, his Lordship Balia Yusof JC said:

Applying the principle enunciated in the above passages, I have no hesitation in concluding that the decision of the registrar in dismissing the appellant's/plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 is interlocutory in nature.

Turning to the case before me, the appeal, as stated at the beginning of my judgment is against the decision of the registrar dismissing the respondent's application for summary judgment under O 14 of the Rules of the High Court 1980. Such decision in my view does not give a final decision on the matters in dispute. The order made by the learned registrar does not deal with the final rights of the parties on the matters in dispute. What the learned registrar ordered merely disposes off an interlocutory matter and the suit proper is yet to be litigated and is still awaiting trial. The rights of the parties can only and will only be determined at the conclusion of the trial before the court when it will finally be determined whether the applicant's claim against the respondent will be allowed or not. As such I hold that the said decision of the learned registrar is not appealable. The preliminary objection raised by the respondent is upheld and this appeal is accordingly struck off with costs.

In *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495, the appellant/defendant appealed against the decision of the High Court at Miri to the Court of Appeal which had dismissed the appellant/defendant's appeal against the ruling of the learned deputy registrar of the High Court who ruled certain documents inadmissible in the course of hearing the assessment of damages. At the appeal before the High Court and before the Court of Appeal, the preliminary issue which was argued was, whether the ruling by the deputy registrar with regard to the admissibility of the documents during the course of the hearing of the assessment of damages was appealable to the High Court in view of the definition of the word 'decision' given in s 3 of the CJA (Amendment Act 1998) with effect from 1 August 1998. In short, as framed by the Court of Appeal, the issue was, whether the ruling of the deputy registrar on the inadmissibility of the documents an appealable ruling?

In upholding the preliminary objection of the plaintiff/respondent's counsel that the ruling made by the learned deputy registrar as to the

A inadmissibility of certain documents in the course of hearing the assessment of damages was not appealable, his Lordship PS Gill JCA (as he then was) in delivering the judgment of the Court of Appeal said:

B On hindsight, we feel that this entire exercise on the interpretation of the meaning of a final order, and an interlocutory order was needless, and the case law that was tendered irrelevant. This is simply because one needs to merely look at the cold print of s 3 of the CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause and matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s 3 of the CJA, as amended. This is the stark reality of s 3 of the CJA as amended. It is simply, and lucidly stated leaving no room for doubt in its application. The intention of the legislature when drafting the amendment was that, the amendment should serve as a filter process for appeals.

C *What we feel, however, must be emphasized, with equal force when scrutinizing s 3 of the CJA as amended, is that, the said ruling must be made in the course of a trial, or hearing. Much emphasis, we feel, is placed on the latter part of the sentence viz-a-viz '... does not finally dispose of the rights of the parties', thus overlooking the fact that the ruling must be made in the course of a trial or hearing of any cause or matter.*

D Counsel, we found, appeared to be preoccupied with the determination of whether the ruling disposes the rights of the parties, but paid scant regard to the fact as to at what juncture the said ruling was made.

E Equal weight should be attached to the entire sentence of s 3 of the CJA as amended, for what must be asked, is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing, of any cause or matter. *If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s 3 of the CJA as amended, and is therefore appealable.*

F To answer to the question posed earlier on, the ruling by the learned deputy registrar on the admissibility of the documents, made in the course of a hearing, was with equanimity, we say, a ruling on an issue other than the ultimate question, and is thus excluded by the exclusion clause in the definition of 'decision' in s 3 of the CJA as amended.

G Suffice to say, the said ruling was not appealable, pursuant to the current version of s 3 and to that end the High Court judge was correct in upholding the preliminary objection of the respondent's counsel, that the said appeal was not competent.

H For the above-mentioned reasons the appeal is dismissed with costs. Deposit to the respondent towards account of taxed costs. (Emphasis added.)

I In *Sivananthan a/l V Jaganathan v Teh Yee Fun & Anor* [2003] 3 AMR 584, the plaintiff appealed against the decision of the learned magistrate who allowed the defendants' application to amend the statement of defence after the commencement of the trial. The appeal was filed pursuant to O 49 r 6(1) of the Subordinate Courts Rules 1980 which states:

Appeal to Judge in Chambers (O 49 r 6) SCR 1980

(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

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In that case, his Lordship Kamalanathan Ratnam J in allowing the appeal on other ground followed the views of his Lordship Abdul Aziz J (as he then was) in *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 and allowed the plaintiff to proceed with the appeal where it was held that 'the right to appeal from a particular decision can only be denied by clear words'.

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In *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284, at the trial before the learned magistrate, the question that arose was whether statements made by the complainants to the police were admissible under s 121 of the then Criminal Procedure Code or whether those statements constituted first information report within the meaning of s 114 of the then Criminal Procedure Code and therefore admissible in evidence and consequently copies should be made available to the defence. Upon hearing both the prosecution and the defence, the learned magistrate ruled that the statement made to the police should be supplied to the defence. The prosecution did not proceed further at the magistrate's court and appealed to the High Court against the ruling of the learned magistrate. In dismissing the appeal, his Lordship Rose CJ held that 'such a ruling is, in my opinion, not an appealable order'.

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His Lordship Rose CJ further observed that:

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... The fact that the Magistrate has gone on to say that copies should be supplied to the defence counsel does not seem to me to affect the position, as in any event, quite apart from any such order from the learned Magistrate, one the statements were produced in evidence in pursuance of a direction under section 116(2) of the Criminal Procedure Code, they would of course become known and available to the defence.

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I would add that to arise at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principle matter in the trial Court.

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In *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129, the accused persons filed an application for leave to appeal to the Court of Appeal under s 50(2) of the CJA. On 1 September 1996, both the applicants were acquitted and discharged by the learned magistrate at the conclusion of the prosecution case for the offence of using criminal force on a female adult under s 354 of the Penal Code. The learned deputy public prosecutor appealed to the High Court Alor Setar against the acquittal. The learned judge of the High Court Alor Setar on 2 April 1997 allowed the DPP's appeal and ordered both the applicants to enter the defence before the learned magistrate. As both the applicants were not satisfied with the decision of the High Court Alor Setar, they applied for leave to the Court of Appeal. In dismissing the application for leave as it was not a fit and proper case for leave to appeal to be granted, his Lordship Lamin PCA said:

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- A** Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.
- Now we may recall s 50(2) of the Courts of Judicature Act 1964, it employs the word 'decision' which is defined in s 3. Early this year by Amendment Act A 1031 of 1998, that definition was amended to read:
- B** 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.
- So, for the purpose of s 50(2), this court has first to ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights.
- C** Certainly not and it would only happen after a decision had been made at the close of the defence.
- Now, one final and vital point to be shown in an application made under s 50(2) is one without which the application may be dismissed. It is this. The affidavit in support must formulate the 'questions of law' which have arisen in the course of the appeal 'and the determination of which by the High Court has affected the event of the appeal'. Not one such 'question of law' was formulated. If we had so minded we could have summarily dismissed the application on this ground.
- D**
- In conclusion we seriously think that we should enter a caveat in an application of this nature and the reason for this we find in the words of the Federal Court in *Au King Chor's* case (at p 219) appropriate:
- E** Assuming for a moment that his is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial Court shall have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.
- F**
- In Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor* [2000] 3 MLJ 328, one of the issues was, *whether the application for leave which was by summons in chambers to amend the reamended statement of claim dated 21 October 1998 in Civil Suit 352/79 was an application interlocutory in nature or it formed part and parcel of the main trial that had already commenced for hearing*. The summons in chambers for leave to amend the re-amended statement of claim was however dismissed with costs. In that case, a distinction was drawn where if the decision to dismiss the application by summons in chambers was an interlocutory matter, the aggrieved party could file an appeal separately to the Court of Appeal but
- G** however if the decision to dismiss the said application was made in the course of the trial without a formal application by summons in chambers but on an oral application during the course of the trial then the appeal if any could only be filed after the decision has been delivered at the conclusion of the main trial. In these circumstances, it was contended in that case that the aggrieved party whose oral application to amend the pleading was dismissed could raise the refusal as a ground for the appeal and there cannot be a separate appeal. In that case, her
- H** Ladyship Siti Norma Yaacob JCA (as she then was) in delivering the judgment of the Court of Appeal ruled that:
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... it is our considered opinion that the application to amend was very much an interlocutory matter and did not form part of the trial and was correctly dealt with by the learned trial Judge in his chambers. If indeed the amendments sought were intended to form part of the proceedings in the trial, there was no necessity to file any summons in chambers as the application could easily have been applied for orally in open court on the morning of 8 April 1999, when the court reconvened after the one month's recess. That was the manner in which amendments were sought for in *Laird v Briggs* when at the trial, counsel for the defendant applied orally at the Bar for leave to amend the statement of defence. It was refused and it was held that under those circumstances the refusal formed part of the judgment and it was not necessary to appeal separately from it.

Having held that their application is very much an interlocutory matter, the respondents had, under r 12(a) of the Rules of the Court of Appeal 1994 ('CA Rules') one month from 7 April 1999, within which to appeal. This was not done until the instant notice of motion dated 15 December 1999, was filed, eight months later. The power to extend time or give leave is very much a discretionary matter and to enable us to exercise our discretion, it is necessary that the respondents place before us some relevant evidential material to explain the delay in filing the notice of appeal. See the decisions of this court in *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 AMR 860, and *Thong Kim Chea v Thong Seng & Co Sdn Bhd & Anor* [1996] 1 AMR 42.

The affidavit in support of the notice of motion does not contain any explanation for the delay and this is not surprising as the respondents had taken the stand that no separate notice of appeal is necessary as the dismissal of their application to amend was made at the trial and formed part of the judgment. As we cannot accept that contention and there has been an omission to give any satisfactory reason for the delay, we consider that this is not a proper case in which we should exercise our discretion to extend time. Under the circumstances we dismissed the notice of motion to amend the pleadings of Civil Suit No 352/79, with costs for two counsel.

Following *Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor* [2000] 3 MLJ 328, it is the view of this court that the definition given to the word 'decision' and the limitation to appeal as provided for in s 3 of the CJA would apply in a situation where at the trial, an application to amend the pleading is made orally before the start of the hearing through counsel at the Bar table and if the application is allowed/disallowed, the aggrieved party cannot appeal against the refusal or the granting of the application to amend. In fact, in those circumstances, there cannot be a separate appeal against the ruling but however, the dissatisfied party could raise the refusal or granting of the application as a ground in his appeal against the whole of the decision of the case at its conclusion.

In *Laird v Briggs* [1881] Vol XVI Ch D 663, at the trial counsel for the defendant at the Bar applied for leave to amend the statement of defence. His Lordship Fry J refused the application and gave judgment for the plaintiff on its merits, granting an injunction against the defendant. The

A defendant filed a notice of appeal from the judgment wherein the nature of the injunction was specified in the notice but it did not refer to the refusal of leave to amend. The defendant then filed an originating motion to the court of appeal seeking permission that he might be at liberty to give notice of appeal from the refusal to amend the statement of defence. Jessel MR held as follows:

B The refusal of leave to amend is simply part of the trial. As you have appealed from the whole judgment the whole case will be open on the appeal, and if the Court of Appeal shall be of opinion that you ought to have had leave to amend it will have power to give you leave then. There is no necessity for a separate appeal. The motion must be refused with costs.

C In *Public Prosecutor v RK Menon & Anor* [1978] 2 MLJ 152, two accused persons were tried at the Sessions Court Johore Bahru for offences under ss 109 and 193 of the Penal Code. At the conclusion of the prosecution case, the President of the Sessions Court called the accused persons to enter their defence. Learned counsel Mr Karpal Singh raised an objection on a point of law namely that the requirements of s 129(i)(b) of the Criminal Procedure Code were not complied with as the sanction to prosecute was not obtained, which was a prerequisite to the commencement of the criminal trial for offences under ss 109 and 193 of the Penal Code. The learned President of the Sessions Court overruled the objection whereupon learned counsel for the accused gave notice that an appeal would be filed against the ruling and applied that further hearing of the case be suspended pending the outcome of appeal. On revision to the High Court which was applied by the state legal advisor who was himself in conduct of the prosecution at the magistrate's court, his Lordship Ajaib Singh J (as he then was) said:

F Under section 307(i) of the Criminal Procedure Code any person who is dissatisfied with any judgment, sentence or order pronounced by a subordinate court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order. But a procedural ruling is not a judgment, sentence or order within the meaning of section 307(i) of the Criminal Procedure Code. There appears to be no local authority on this particular point but there is this Singapore case of *Public Prosecutor v Hoo Chang Chwen* where it was held that the prosecution or the defence cannot appeal in the middle of a trial against a procedural ruling because such a ruling is not an appealable order within the provisions of the Criminal Procedure Code. The provisions of the Criminal Procedure Code referred to in that case are in *pari materia* with those in our Criminal Procedure Code relating to criminal appeals from the subordinate courts to the High Court.

I The legislature has for good reason refrained from making any provision for an appeal to be preferred against a procedural ruling made in the subordinate court in a criminal case or matter. In the course of criminal trials in the subordinate courts the presiding officers quite often make rulings on questions which are purely procedural in nature. If an appeal is allowed to be preferred by the prosecution or the defence against a procedural ruling further hearing

of the particular criminal trial in the subordinate court will necessarily have to be stayed pending the outcome of the appeal in the High Court. Imagine the number of such appeals which are bound to be preferred against scores of procedural rulings which are a daily occurrence in criminal trials in the subordinate courts in the country. The result would be that the whole administration of criminal justice would be bogged down. 'The proper time', said Rose CJ in the case of *Public Prosecutor v Hoo Chang Chwen*, supra, 'to take such (procedural) points would be upon appeal, after determination of the principal matter in the trial court'.

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In *Indran & Anor v Public Prosecutor* [1985] 1 MLJ 326, on 5 December 1983 the appellants were committed for trial to the High Court on a tentative charge of murder. The appellants filed an appeal to the High Court against the said order of the learned magistrate. At the appeal, the question raised was whether an order made by the learned magistrate in Port Dickson on 5 December 1983 whereby the appellants were committed for trial on a tentative charge of murder before the High Court Seremban was appealable. In dismissing the appeal against the decision of the learned magistrate who had committed the appellants for trial on a tentative charge of murder before the High Court. His Lordship Peh Swee Chin J (as he then was) said:

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The answer to this question lies with the meaning of the words '... judgment, sentence or order', especially the word 'order' against which a party may prefer an appeal. Thorne J had very clearly and correctly given the word a restricted meaning but his Lordship did so on the ground of certain inconclusiveness of the order of committal for trial as explained by him, but in my view, with respect, the real rationale for such a restricted meaning was pin-pointed by Hashim Yeop A Sani FJ in the very recent case of *Cheak Yoke Thong v Public Prosecutor*, in which the same word in the same section came up for judicial interpretation. His Lordship applied the maxim of *ejusdem generis* and construed the word 'order' with the immediately preceding words of 'judgment' and 'sentence' and held that the word 'order' should therefore mean an order that should finally dispose of the rights of the parties. His Lordship further held that the order of the lower court refusing to disqualify itself on the ground of likelihood of bias was not appealable. Here in the instant appeal, the learned magistrate could have no power to acquit or convict the appellants, his order of committal for trial, not being such a final order, is therefore not appealable. Having so decided, it is not necessary to go into evidence to ascertain whether there were sufficient grounds for committing the applicants for trial in connection with the allegedly tragic death of a young unmarried girl said to have been raped, dumped near a rubbish dump and then burnt in what appears to be a most heinous crime.

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In *Ratnam v Cumarasamy & Anor* [1962] MLJ 330, there was an application for leave to appeal to the Yang Di Pertuan Agung against an order of the Court of Appeal made on 16 May 1962 which had been dismissed, the plaintiff/applicant's application for leave to file the record of appeal out of time. In order to appreciate the decision in that case, it is relevant to reproduce the rules at that time governing leave to appeal to

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- A Yang DiPertuan Agung. Section 3(1) of the appeals from the Supreme Court Ordinance 1959 and the relevant parts of that subsection on the said application are as follows:

... an appeal shall lie from the Court to the Yang di-Pertuan Agung with the leave of the court ...—

- B (a) from any final judgment or order in any civil matter where:
(i) the matter in dispute in the appeal amounts to or is of the value of four thousand five hundred dollars or upwards;
...; and
(b) from any interlocutory judgment or order which the Court considers a fit one for appeal; ...

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In granting leave to appeal, his Lordship Good JA said:

In the present case our order refusing an extension of time for the applicant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful plaintiff from appealing against the order of the High Court. Our order of the 15 May 1962, is therefore for the purposes of appeal a final order against which the applicant may appeal as of right provided the value of the subject matter is not less than \$4,500 (and as to that there is no dispute) and provided that he complies with the usual conditions as to security and the provision as to time.

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I would allow the application with costs and give conditional leave to appeal on the appellant giving security for costs in the sum of \$5,000 and filing the record within three months.

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Hill Ag CJ: I agree with the judgment which my learned brother Good JA has just read. Out of a number of conflicting opinions and decisions that of Lord Alverstone in *Bozson's* case stands out as the one judgment that provides a real and practical test for determining whether an order is final or interlocutory and I too would apply it here.

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In *Tee Than Song Construction Co Ltd v Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, his Lordship Wee Chong Jin CJ held that where leave was granted to the plaintiff to sign final judgment against the defendants, it disposes of the rights of the parties and it is a final Judgment which permits the defendants to appeal (see *Escoigne Properties Ltd v Inland Revenue Commissioners* [1958] AC 509 at p 565).

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In *Tio Chee Hing v Chung Khiaw Bank Ltd* [1982] 1 MLJ 137, the applicant applied for conditional leave to appeal to His Majesty Yang Di Pertuan Agung against the whole of the decision of the Federal Court which had dismissed the application against the decision of the High Court and for stay of the execution of the orders/judgments in the civil suits. The respondents having obtained judgment in default against the applicant in both the civil suits on 6 April 1970 obtained leave under O 42 r 23 of the Rules of the High Court 1957 to issue execution against the appellant on the two judgments entered more than six years ago. The applicant appealed to the Federal Court against the order of the High Court granting leave to

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issue execution against the applicant. The appeal was dismissed by the Federal Court on 8 December 1980 for the reason that the applicant had not satisfied the Federal Court that the learned judge had exercised his discretion wrongly.

Learned counsel for the applicant submitted as follows:

Mr Sethu for the applicant submits that this is a final judgment the subject matter being above \$25,000. He argues that there can be more than one final order and that an execution order is not interlocutory but machinery to get a final judgment into effect, which if we understand him aright makes it a final order as well. He argues that since this is an application for leave to appeal made under section 74(1)(a) of the Courts of Judicature Act, then an appeal lies as of right and the Federal Court has no discretion to refuse leave of appeal, citing as his authority the Privy Council decision in *Lopez v Valliappa Chettiar*.

On the other hand, learned counsel for the respondents in *Tio Chee Hing's* case, apparently admitted to the uncertainty as to whether the order was final or interlocutory as the appeal was against the order of the learned judge of the High Court which had granted leave to execute. However, he suggested that the court apply the test as in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547.

In dismissing the application in that case, his Lordship Wan Suleiman FJ (delivering the judgment of the Federal Court) said:

We are of the view that the order by the learned trial judge granting leave to issue execution under Order 42 rule 23 of the Rules of the High Court 1957 is not a final order and should be regarded for all intents and purposes as an interlocutory one. (For examples of interlocutory orders, a useful list may be found on pages 745 and 746 of the Supreme Court Practice, 1967 Vol 1). It would therefore fall under section 74(1)(b) of the Courts of Judicature Act so that in order to obtain leave, the applicant will have to satisfy us that this is an order which is a fit one for appeal. Appellant has failed to do so.

PROCEDURAL RULING

In fact as early as 1993, long before the amendment to s 3 of the CJA, the highest court in this country, the Federal Court in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 through the then Rt Hon Lord President Abdul Hamid Omar LP held that a procedural ruling was not appealable. In that case, at the High Court, there were two applications, one, was by the defendants to set aside an ex parte injunction being encl 21 and the other was encl 27 by the plaintiff for a substantive notice of motion for committal against the defendants after having obtained leave on an ex parte application. In the meantime, before the start of the hearing of encl 27, the plaintiff had raised the preliminary objection that the defendants ought not to be permitted to be heard on encl 21 until after encl 27 had been disposed off. His Lordship Anuar J (as he then was) ruled that encl 27 be heard first and after the disposal of it the court would then deal with encl 21. The defendants were dissatisfied with the said ruling. Hence,

- A the appeal to the Supreme Court (now known as the Federal Court). In appeal, his Lordship Abdul Hamid Omar LP observed:

We would observe that this is clearly an appeal against mere procedural ruling. This court has always discouraged such appeals as they stand in the way of a speedy disposal of substantive trials and delay and expeditious result of the main proceedings.

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In the instant case, learned counsel for the appellants referred to this court the explanatory statement of the bill to assist this court in construing the definition given to the word 'decision' in s of the CJA. In *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, the Federal Court allowed

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reference to *Hansard's* as an aid to statutory interpretation where the enactment was ambiguous or obscure, or which if literally construed might lead to an absurdity and provided always that the statement reported in *Hansard* was made by a Minister or other promoter of a bill and considered the various passages in the ministerial statement with the view to resolving the ambiguity in the provision to s 22(1) of the National Land Code.

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However, his Lordship Edgar Joseph Jr FCJ (in delivering the judgment of the Federal Court) cautioned that:

We hasten to add, however, that when resort to *Hansard* is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since *it is only available as an aid to interpretation*. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law. (Emphasis added.)

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EXPLANATORY STATEMENT OF THE BILL

- F Be that as it may, the explanatory statement of the bill which was referred to by the learned counsel Dato' RR Sethu for the appellants which sought to amend s 3 of the CJA (Act 1031/98) states as follows:

At the moment, *in the course of hearing a case, if the court decides on the admissibility of any evidence or document*, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the Superior Court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against *every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.* (Emphasis added.)

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- H In *Pepper v Hart* [1993] AC 593 at p 617, Lord Griffiths in the passage of the opening speech said:

My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound

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reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament?

In *R v Environment Secretary, ex p Spath Holme Ltd* (HL(E)) [2001] 2 AC 349, Lord Nicholls of Birkenhead said (at pp 396–399):

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with the meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613: ‘We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used’.

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms: see section 3 of the Human Rights Act 1998. The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the Courts employ other ized aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute’s legislative antecedents.

- A** *Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, "the mischief and defect for which the common law did not provide": Heydon's Case (1584) 3 Co Rep 7a, 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.*
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This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279—280:

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- E** The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.
- F**
- G** This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.
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That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty

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might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.

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For some years before 1993 a self-imposed judicial rule precluded use of parliamentary proceedings as an external aid. This exclusionary rule was relaxed by this House in *Pepper v Hart* [1993] AC 593 so as to permit use of parliamentary materials as an aid to construction where certain conditions are satisfied. One of these conditions is that the legislation must be ambiguous or obscure, or lead to an absurdity: see Lord Browne-Wilkinson, at p 640.

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I can see nothing in this formulation or in principle to suggest that the ambiguity or obscurity or absurdity must be of any particular type. The purpose for which a statutory power is conferred is just as much a question of interpretation of the statutory provision as is the meaning of a particular word or phrase. It cannot be right for the courts to look at parliamentary proceedings, if they assist, on the interpretation of a particular word or phrase, but to decline to look at parliamentary proceedings, however much assistance they may give, when deciding, as a matter of interpretation, what was the purpose for which a power was conferred. The point is underlined by noting that, if drawn, this distinction has the consequence that, in the latter type of case, the courts will look at other forms of extraneous material if they assist, such as statements in Government white papers, but not at what was said by Government ministers in Parliament. This would not be a rational distinction.

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Experience has shown that the occasions on which reference to parliamentary proceedings is of assistance are rare. To be of assistance as an external aid, the parliamentary statement relied upon must be clear and unequivocal. Otherwise it is of no real use. Parliamentary statements seldom satisfy this test on the points of interpretation which come before the courts. Increasing awareness of the lack of help provided by parliamentary material will, it is to be hoped, result in counsel being more realistic and more sparing in their references to such material.

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As Lord Cooke of Thorndon points out in his speech, this does not mean that the courts will shut out, and not even look at, parliamentary material which one party reasonably contends supports his interpretation of ambiguous legislation. Rather, the courts will consider the material to see whether counsel's contention is well founded. If the parliamentary statements relied upon are not clear, they are of little or no value and cannot qualify as an external aid in the particular case. They will fail to satisfy the third of Lord Browne-Wilkinson's conditions: see *Pepper v Hart* [1993] AC 593, 640.

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If, however, the statements are clear, and were made by a minister or other promoter of the Bill, they qualify as an external aid. In such a case the statements are a factor the court will take into account in construing legislation which is ambiguous or obscure or productive of absurdity. They are then as much part of the background to the legislation as, say, Government white papers. They are part of the legislative background, but they are no more than this. This cannot be emphasized too strongly. Government statements, however they are made and however explicit they may be, cannot control the meaning of an Act of Parliament. As with other extraneous

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A *material, it is for the court, when determining what was the intention of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a Government statement. The weight will depend on all the circumstances. For instance, the statement might conflict with the principle of interpretation that penal legislation is to be construed strictly. (Emphasis added.)*

B Lord Cooke of Thorndon at pp 403–404 said:

It is necessary to distinguish two things often treated as if they were one. First there are cases in which the court can in the end derive real help from Hansard, even if it is not necessarily decisive help. I think that this case is an example. Hansard shows that the courts will not be thwarting a clear intention of the legislators by holding that the wider interpretation is correct. Secondly there is the question whether it is proper for counsel to cite Hansard. A practice of constant citation is unacceptable to the courts. Counsel must be expected to use their discretion. In this case I think that counsel for the landlords was fully justified in his citations. After all, they convinced the Court of Appeal. *To shut out either party from relying on Hansard would have been, in my opinion, contrary to natural justice. (Emphasis added.)*

C In *DYTM Tengku Idris Shah Ibnu Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd* [2002] 2 MLJ 11 at p 21, his Lordship Haidar FCJ (as he then was) and presently the Chief Judge of the High Court of Malaya said:

E In pursuing the purposive approach, one of the matters that can assist this court in interpreting the amended art 181(2) and arts 182 and 183 of the Constitution is to refer to the Parliamentary reports or Hansard. This is permissible as held by the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345.

F In another passage, his Lordship Haidar FCJ (as he then was) said:

However, we note and agree with the caution put forth by Edgar Joseph Jr FCJ, on the same page as follows:

G ‘We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an aid to interpretation. To hold otherwise would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.’

H We also note that Singapore courts have followed the major judgment in *Pepper v Hart*. Indeed the rule in *Pepper v Hart* has now received statutory recognition in Singapore by way of s 2 of the Interpretation (Amendment) Act 1993. May be it is time such a provision given statutory recognition in our Interpretation legislation as with s 17A referred to earlier. It will give statutory force to the courts to look the policy speech of the Minister or the promoter of the Bill in *Hansard* for the purpose of an aid to the interpretation of statutes.

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In *Wilson v First County Trust Ltd* [2003] All ER (D) 187, Lord Nicholls of Birkenhead said:

The courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of the policy considerations which led to legislation taking a particular form. The exercise on which the Court of Appeal engaged is not an appropriate exercise for a court. There are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the Convention. The policy and objects of a statute must be determined by interpreting its language, which alone represents Parliament's intention ...

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The starting point for any consideration of the matters raised by these submissions is, indeed, the respective roles of Parliament and the courts. *Parliament enacts legislation, the courts interpret and apply it. The enactment of legislation, and the process by which legislation is enacted, are matters for Parliament, not the courts.* Thus, article 9 of the Bill of Rights 1689 provides, in modern spelling, that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' This provision is part of the wider principle that the courts and Parliament are both astute to recognize their constitutional roles ...

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Before the decision in *Pepper v Hart* a self-imposed judicial rule excluded use of parliamentary materials as an external aid. The courts drew a veil around everything said in Parliament. This had the consequence that a statement made in a government white paper, issued by the relevant government department before legislation was introduced, could be used as an external aid. But if the same statement were made by a minister of the department in Parliament when promoting the Bill in one or other House, the courts were strictly unable to take cognisance of the minister's statement.

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In relaxing this self-imposed rule the House enunciated some practical safeguards in *Pepper v Hart*. These were intended to keep references to Hansard within reasonable bounds. *One of these safeguards is that the parliamentary statement must be made by the minister or other promoter of the Bill.* In imposing this cautionary limitation the House was not, I believe, intending to attribute to ministerial statements some special status, thereby encroaching upon the court's constitutional task of determining objectively what was the intention of Parliament in using the language in question. A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 635, such statements 'are as much background to the enactment of legislation as white papers and Parliamentary reports'. But they are no more than part of the background. As I emphasized in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 399, however such statements are made and however explicit they may be, they cannot control the meaning of an Act of Parliament.

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...What is important is to recognize there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration

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A and regulation by Parliament alone. The use by courts of ministerial and other promoters' statements as part of the background of legislation, pursuant to *Pepper v Hart*, is one instance. Another instance is the established practice by which courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament.

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When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

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This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. *The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament.* By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

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To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament.

... that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

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Beyond this use of *Hansard* as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament.

Lord Hope of Craighead

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This, then, is the justification for resorting to Hansard in cases where the question at issue is not one of interpretation but whether the legislation is compatible. A cautious approach is needed, and particular care must be taken not to stray beyond the search for material that will simply inform the court into the forbidden territory of questioning the proceedings in Parliament. To suggest, as the Court of Appeal did at [2002] QB 74, para 36, that what was said in debate tends to confuse rather than illuminate would be to cross that boundary. It is for Parliament alone to decide what reasons, if any, need to be given for the legislation that it enacts. The quality or sufficiency of reasons given by the promoter of the legislation is a matter for Parliament to determine, not the court.

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Lord Hobhouse of Woodborough

It has long been the case that ministerial statements made in the House may be referred to when they are relevant to a question to be determined by a court.

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Lord Rodger of Earlsferry referred to a statement of Dickson J in:

In Gustavson Drilling (1964) Ltd v Minister of National Revenue [1977] 1 SCR 271 at p 282 where it is stated:

The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction:

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In *The Sussex Peerage* (1844) HL 11 CL & FIN Vol LXV 11 at p 51, Tindal Ch J said:

... the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.

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Having considered the views and the observation in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 which considered and followed *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 where *Pepper v Hart* [1993] 1 All ER 42 was followed in *DYTM Tengku Idris Shah Ibnu Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd* [2002] 2 MLJ 11, *R v Environment Secretary, ex p Spath Holme Ltd* (HL(E)) [2001] 2 AC 349 and *Wilson v First County Trust Ltd* [2003] All ER (D) 187, this court is of the view that although the definition given to the word 'decision' in s 3 of the CJA is expressly clear and not ambiguous or obscure, where there are conflicting views by High Courts of co-ordinate jurisdiction on the

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- A interpretation of a particular amended statutory provision and where there is no decision on the point by the Court of Appeal or the Federal Court, the explanatory statement of the bill could be referred as an aid to statutory interpretation as construction is always a matter of law for the court (see *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1) (for contrary views on the reference to *Hansard* see *Katikiro of Buganda v Attorney General* [1961] 1 WLR 119, *Re First Malaysia Finance Bhd* [1990] 1 MLJ 504 at p 505 and *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).
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- C By looking at the definition given to the word ‘decision’ in s 3 of the CJA and having referred to the explanatory statement of the bill, this court is of the view that the whole intention of having given the definition to the word ‘decision’ by the amendment was to ensure that no appeal shall be entertained if it concerns any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose off the rights of the parties by that ruling. In other words, there are two prerequisites, first, *the ruling must be made in the course of a trial or hearing of any cause or matter* which certainly does not include a decision made at the conclusion of a substantive interlocutory application even if the said application is made under the heading of the name trial. The second prerequisite is that *the ruling which was made in the course of a trial or hearing of any cause or matter must not have finally disposed off the rights of the parties*. Basically, one cannot read the second prerequisite in s 3 of the CJA in isolation, namely, *does not finally dispose off the rights of the parties* as this cannot stand on its own itself and must be read together within the context of the first prerequisite being *the ruling made in the course of a trial or hearing*.
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Lord Wilberforce referred to the passage of Viscount Simonds in *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at p 461 which is as follows:

- F *For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use ‘context’ in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.* (Emphasis added.)
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- H The natural reading of both the prerequisites powerfully supports the interpretation given in *Sitrac Corp Sdn Bhd*. The ruling referred to and which was made in the course of a trial or hearing of any cause or matter must also include a ruling made in the course of hearing an interlocutory application if that ruling does not finally dispose of the rights of the parties. On the other hand, if a decision is given at the conclusion of the hearing of an interlocutory application on its merits and if that decision finally disposes off the rights of the parties, the aggrieved party cannot be denied the right of appeal as it was not a ruling made in the course of hearing the interlocutory application but it was a decision made at the conclusion of the hearing of the interlocutory application on its merits. The substantive right
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of access given to an aggrieved party to appeal to the judge of the High Court should not be confused with a procedural step to appeal and it must be distinguished as a restriction on the scope of a right to appeal must be expressly excluded and not by implication. In *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at p 69, Mellish LJ in treating matters of pure procedure differently from substantive law said 'no suitor has any vested interest in the course of procedure, no any right to complaint if during the litigation, the procedure is changed, provided, of course, no injustice is done' (see *Yew Boon Tew v Kenderaan Bas MARA* [1983] 1 MLJ 1.

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STATUTORY INTERPRETATION

In *Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union* [1971] 1 MLJ 102 at p105, his Lordship Gill FJ said:

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The basic rule of interpretation is that words used in an enactment must be understood in their proper context.

In *Lee Boon Tuan v Public Prosecutor* [1960] MLJ 179 at p 180, His Lordship Ismail Khan J (as he then was) said:

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The function of the court is limited to interpretation.

In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 2 WLR 513 at p 517, Lord Reid said:

... construction of the provisions of an Act is for the court and for no one else. This may seem technical but it is good sense.

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... We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what parliament meant but the true meaning of what they said.

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In *The King v Banbury* 1 AD & E 136 1159 at p 1161, Patteson J observed:

... the case must be decided according to the plain sense of the words used by the Legislature.

In that case Parke J observed:

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... I am not sure whether we shall fulfil the intention of the Legislature; it has often happened that we have been unable to do so throughout a series of decisions. Still the rule of construction which the Court must follow is, to intend the Legislature to have meant what they have actually expressed, unless a manifest incongruity would result from doing so, or unless the context clearly shews that such a construction would not be the right."

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In *Corocraft Ltd and another v Pan American Airways Inc* [1969] 1 QB 616 at p 638, Donaldson J (as he then was) said:

The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the

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A judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

In *Maunsell v Olins & Anor* [1974] 3 WLR 835 at p 837, Lord Reid said:

B I fully accept that a word should be given its ordinary meaning unless there is sufficient reason to give it in the particular case a secondary or limited meaning.

Viscount Dilhorne said:

C ... I do not think that it is right, when Parliament uses that word in a statute to conclude that it is intended to have the meaning that conveyances attach to it unless a contrary intention appears.

In *Leader v Duffey* (1888) 13 App Cas 294 and at p 301, Lord Halsbury LC said:

D All these refinements and nice distinction of words appear to me to be inconsistent with the modern view — which is I think in accordance with reason and common sense — that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made.

F In *Warburton v Loveland* (1831–32) II Dow & Clark 806, Tindal Ld Ch J said:

... It must therefore be determined upon principle, not upon authority; and the only principle of decision that is applicable to it is the fair construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference in all cases where a doubt arises to the object which the Legislature had in view when the statute was passed. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature. If in any case a doubt arises upon the words themselves, we must endeavour to solve that doubt by discovering the object which the Legislature intended to accomplish by passing the Act.

H And although it would be impossible to consider a question to be free from difficulty where opinions have been formed upon it in direct contradiction to each other, and each opinion has been supported with such acuteness and ability by the very learned Judges of the several Courts below, before which it has been agitated; yet we have, upon consideration, come to the conclusion,

I that both the closer interpretation of the words of the statute, and the construction which, at the [490] same time, most suppresses the mischief the Legislature had in view, and most advances the remedy which is held forth ...

In *Siskina (Cargo Owners) v Disstoss SA* [1979] AC 210 at p 240, Bridge LJ observed: A

... the court should exercise severe self-restraint to avoid the temptation, under the guise of construction to engage in what if in fact legislation.

In *Wilson v First County Trust Ltd* [2003] All ER (D) 187, Lord Hope of Craighead said: B

... legislation, is the exclusive responsibility of Parliament. The judges' task is to interpretative, not to legislate.

Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the executive. The courts for their part must respect this principle which means that the legislative function belongs to Parliament and not to the executive. C

Lord Nicholls of Birkenhead said:

... all courts are keenly aware of the importance of the legislature and the judiciary each discharging their own constitutional roles and not trespassing into functions that belong to the other. D

In *Re S (Minors) (Careorder: Implementation of Careplan)* (HL (E)) [2002] 2 AC 291 at p 313, Lord Nicholls of Birkenhead said:

Interpretation of statutes is a matter for the courts; the enactment of statutes and the amendment of statutes, are matters for Parliament. E

As to the distinction between interlocutory in form and an application which decides the rights of the parties (see *Gilbery v Endean* (1878) 9 Ch D 259 and *Rassage v Rossage & Anor* [1960] 1 All ER 600). As to the distinction whether an order is final or interlocutory (see *In re Fawcilt Galland v Burton* (1885) F 365, Vol XXX 231 and *Hanning v Maitland* [1969] 3 All ER 1558). As to whether a consent order is a final judgment (see *Shaw v Hertfordshire County Council* (1899) 2 QB 282). F

Be that as it may, it could also be deduced from the explanatory statement that it does not expressly exclude appeals against decisions given in substantive interlocutory application if there was no ruling made in the course of hearing the said application. Reference to *Hansard* should no doubt be sparingly applied but given the situation of the legal issue in the instant case where there are conflicting views on the interpretation of the word 'decision' as provided for in s 3 of the CJA, perhaps under the circumstances it could be referred to as an aid to know the intention of parliament when the proposed amended bill to s 3 of the CJA was laid before Parliament. Nevertheless, this court wishes to make it clear that even if this court had not referred to the explanatory statement the decision of this court on the interpretation of the word 'decision' as provided for in s 3 of the CJA would have been still the same and would have followed the interpretation given in *Sitrac Corp Sdn Bhd*. G
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At this stage, this court wishes to express its dilemma because of the two conflicting views given by two different High Courts where both their Lordships have been elevated to the Court of Appeal. Notwithstanding this I

- A predicament, this court would still give its independent views on the statutory interpretation of the word ‘decision’ as provided for in s 3 of the CJA as both the High Court decisions at the time remained as decisions of courts of coordinate jurisdiction (see *Ogden Industries PTY LTD v Lucas* [1969] 3 WLR 75, *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211, *Ng Cheah Cheong v Ong Sing Hock* [2002] 6 MLJ 481). The object of the amendment to s 3 of the CJA with effect from 1 August 1998 was to eliminate the obstruction of a speedy disposal of the main trial where parties have the propensity to appeal against every procedural ruling. Therefore, this court takes the view that a purposive interpretation must be given especially when it involves an amendment to existing provisions and legislative intent is of utmost importance.
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The Rt Hon Lord Denning, Master of the Rolls in his book, the *Discipline of Law* said:

- Let it not be thought ... that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application — a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.
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- Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co* [1978] 3 WLR 849 at p 854 said:
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Judges are more than mere selectors between rival views — they are entitled to and do think for themselves.

- In view of the stand taken by this court on the interpretation of the word ‘decision’ in s 3 of the CJA, this court wishes to take this opportunity to emphasize that the decision which I made in *Tetuan J & S Holdings Sdn Bhd* was in reference and limited only to the ruling made on the preliminary objection at the outset of the hearing of the full trial where the ruling by the learned Magistrate did not finally dispose of the rights of the parties. It is the respectful view of this court that that decision in *Tetuan J & S Holdings Sdn Bhd* certainly cannot be extended to decisions made upon full hearing on the merits of an interlocutory application even if the decision at the conclusion of the hearing does not finally dispose of the rights of the parties and the aggrieved party has the right of appeal to the High Court and subject to the limitation in s 28 of the CJA as the definition given in s 3 of the CJA expressly refers to any ruling made in the course of a trial or hearing of any cause or matter which would include any ruling made on a preliminary objection and the ruling does not finally dispose of the right of the parties.
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The decision of the High Court in the three cases namely, *Alexander John Shek Kwok Bun*, *Seabance Ge Capital Sdn Bhd* and *Hong Hock Trading Co* were appeals to the High Court against decisions made upon full hearing of an interlocutory application which in the respectful view of this court cannot be reconciled or compromised with the definition given to the word 'decision' in s 3 of the CJA. This court therefore follows the reasoning and the interpretation given to the word 'decision' in s 3 of the CJA by his Lordship Abdul Aziz J (as he then was) in *Sitrac Corp Sdn Bhd* (see *Malaysia British Assurance Berhad v Chung Choi Yoke* [2003] 4 AMR 124) a recent decision of his Lordship Low Hop Bing J which has also followed the decision in *Sitrac Corp Sdn Bhd*. Unless and until there is an express statutory provision to limit the appeal against the decision made on the merits in an interlocutory application, a party cannot be barred from appealing to this court against that decision. This court cannot lose sight that the right of an appeal is not a mere matter of procedure but a substantive right allowed to an aggrieved party so long as the appeal is filed in accordance with the rules of procedure. It is in fact a vested right and that such a right to appeal to the higher court which accrues to a litigant exist as on and from the date of the institution of the suit unless it is excluded by express and clear statutory words (see *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 at p 22). In fact, in *Malaysia Shipyard and Engineering Sdn Bhd v Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359 at p 361, in the context of interpreting another statutory provision, His Lordship Salleh Abas LP said:

If the legislature had so intended one would expect it to have spelt out that power in an express and clear provision to that effect ...

This court is of the view that if the definition to the word 'decision' given in s 3 of the CJA was intended to prevent appeals from a decision made on the merits in an interlocutory application filed by summons in chambers arising out of the principle matter and the decision does not finally dispose of the rights of the parties, the legislature would have expressly provided for such a situation. However, this court is of the view that unless Parliament has by express words so legislated so as to deprive this court of jurisdiction to hear appeals from a decision made on the merits in an interlocutory application, this court on its own motion will not under the disguise of statutory interpretation deny a litigant from coming to this court by way of an appeal against the decision of the lower court unless the statutory words are made crystal clear to bar such an appeal. This court is of the respectful view that pioneering substantial and indirect amendments to the right of appeal should not be the function of the courts but it should be left to the Rules Committee or Parliament. So long as recourse to appeal to this court against the decision made in an interlocutory application on its merits is not barred by any express statutory provision, this court will and can safely entertain appeals against the decision made by the lower courts pursuant to O 49 r 6(1) of the SCR subject to the limitation as provided for in s 28(1) of the CJA and against the decision of the registrar of the High Court in an interlocutory application as provided under O 56 of the RHC 1980 ('the RHC') (see *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd*

- A** [1994] 2 MLJ 97 and *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30).

Order 49 r 6(1) of the SCR reads as follows:

- B** (1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

Order 56 of the RHC reads as follows:

APPEALS FROM REGISTRAR AND JUDGE

- C** 1(1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

- D** The power or discretion to summarily reject appeals from decisions made after a full hearing of an interlocutory application on its merits by affidavit evidence must be exercised with greatest caution as it may cause confrontation between legislative words and intention and interpretation by courts. Appeals against interlocutory orders which are mounted after substantive issues were raised cannot restrict the aggrieved party from appealing against the decision unless it relates to procedural matters or against every aspect of rulings made in the course of a trial or hearing of an interlocutory application. To refuse an appeal at the outset of the hearing is a serious, grave and fundamental interference in the right of a party to appeal against decisions unless the defect is fundamental. In the absence of any such clear words, a party cannot be denied exercise of his right of appeal to a judge of the High Court against the decision given in an interlocutory application by the lower courts and the registrar of the High Court on hearing the merits as provided under O 49 r 6(1) of the SCR and O 56 of the RHC respectively.
- E**
- F**

- G** In construing the word ‘decision’ as provided for in s 3 of the CJA, in the context of appeals, this court must in fact seek to apply the spirit of the reasoning behind the amendment as provided for in s 3 which is amongst others, to limit appeals against procedural rulings made in the course of hearing any cause or matter and, it was not intended to limit appeals against decisions made on interlocutory applications on its merits. It is the respectful view of this court that the court cannot and should not, under the guise of construction, encroach into the boundaries of the legislature which might convert the interpretation into legislation and this is certainly not the function of this court. Perhaps it may be a matter to be considered by the Rules Committee as provided under s 20 of the CJA or for the legislature. Justice is not a cloistered virtue; and litigants must be allowed to be tested by a judge of the High Court whenever they are dissatisfied with a decision by a lower court or by the registrar of the High Court, so long as it was a decision given in a formal interlocutory application on its merits.
- H**
- I**

In *Attorney General v Times Newspapers Ltd* [1974] AC 273 at p 309, Lord Diplock in the contexts of law of contempt observed as follows:

The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities.

A

In the circumstances, both the defendants' appeals are competent and can proceed for hearing as the decision to disallow the defendants' applications to strike out the statement of claim were not made in the course of hearing the interlocutory application to strike out the plaintiffs' claim but was a decision made upon hearing the merits of the said application.

B

Defendants' appeal allowed.

Reported by Lim Lee Na

C**D****E****F****G****H****I**